No. 80-841

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN F. HENSLER, JR. and CHARLES BATTY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court below erred in overruling Petitioners' Motion to Suppress the warrantless search of the locked cabin area of a sailboat which had been stranded on a sandbar in intercoastal waters where numerous officers had surveilled the boat for a number of hours and had ample time and opportunity to apply for a search warrant.

2. Whether the Court below erred in failing to base its decision on the Motion to Suppress on factual showings contained in the record.

3. Whether the Court below erred in overruling Petitioners' Motion to Suppress the warrantless search of Petitioner Hensler's suitcase at an airport security gate in the absence of any showing of suspicious circumstances or a valid consent

by Petitioner.

4. Whether the Court below erred in admitting Petitioner Batty's counselless confession in the absence of any showing of a valid waiver by Petitioner of his right to counsel.

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO
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Come now Petitioners, JOHN F. HENSLER, JR., and CHARLES BATTY, and respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered July 23, 1980, rehearing en banc denied August 26, 1980.

OPINIONS BELOW

Petitioners were convicted on December 12, 1978, in a bench trial in federal District Court for the District of South Carolina of conspiracy to import marijuana (21 U.S.C. §963), importation of marijuana (21 U.S.C. §§952(a), 960; 18 U.S.C. §2) and possession of marijuana with intent to distribute (21 U.S.C. §841(a)(1); 18 U.S.C. § 2). On July 23, 1980, the Court of Appeals for the Fourth Circuit affirmed the judgment. A copy of this Opinion is attached to this Petition as Appendix, Exhibit A. Rehearing and rehearing en banc was denied on August 26, 1980. A copy of this Order is attached to this Petition as Appendix, Exhibit B.

JURISDICTION

In the criminal trial below, among other issues, Petitioners challenged the

legality of a warrantless search of the locked cabin of a sailboat, and the warrantless search of Petitioner Hensler's suitcase at an airport security gate as repugnant to the Fourth Amendment to the Constitution. Additionally, Petitioner Batty challenged the admission of his confession as contrary to the Fifth and Sixth Amendments to the Constitution.

Petitioners' Motion for Rehearing En Banc was denied on August 26, 1980. The Chief Justice entered an Order on October 15, 1980, extending the time for filing a Petition for Writ of Certiorari to and including November 24, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall have the right...to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

Petitioners JOHN F. HENSLER, JR. and CHARLES BATTY were named, along with a third

individual, Michael C. Falker,[1] in a three-count indictment. Count 1 alleged conspiracy to import approximately 21,000 pounds of marijuana (21 U.S.C. §963); Count 2, importation of marijuana (21 U.S.C. §§952(a), 960; 18 U.S.C. §2); Count 3, possession with intent to distribute (21 U.S.C. § 841(a)(1); 18 U.S.C. §2). A. 8-11.[2]

Pretrial motions were filed, and evidentiary hearings held on three Motions to Suppress relating to: the search of the sailboat Desiderata-D; the airport search of Petitioner Hensler's luggage; and Petitioner Batty's oral confession. All were denied. A. 199; 240; 261. Trial by jury was waived, and the District Court found both Petitioners guilty on all three counts. A.

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[1] As of this date, Falker has not yet been arrested and remains a fugitive. App. 2, n.1.

[2] "A." refers to the Appendix filed in the Court of Appeals. "App." refers to the Appendix to this Petition.

371-319. Petitioner Hensler was sentenced to serve a term of five years imprisonment on Count 1, one year imprisonment on Count 2, and five years imprisonment on Count 3, the sentences on Counts 1 and 2 running consecutive, with Count 3 to run concurrent. Additionally, a special parole term of five years was imposed. A. 16. Petitioner Batty was sentenced to serve a term of four years on each count, all sentences to run concurrently, followed by a special parole term of four years. A. 18.

At pretrial hearings, the evidence showed the following events relative to the legal questions here involved:

On August 29, 1977, the sailboat Desiderata-D ran aground on a sandbar in Murrell's Inlet, South Carolina. A. 23. At approximately 4:00 P.M. the following day, officers from a number of agencies boarded the grounded vessel without a search war-

rant, broke a lock off of its main hatch and seized approximately 21,000 pounds of marijuana from its cabin. A. 78.

The boat first came to the attention of law enforcement around noon the day of the search, when Detective Johnson received a phone call from an unknown individual stating that he had some information relating to marijuana on a grounded boat near Garden City. A. 42-43. Johnson arranged to meet him later, A. 23-24, and then went to lunch with SLED Agent Anderson. A. 43-44, 58, 62, 63.

The officers then drove to meet the caller. A. 55, 63. A young man, who identified himself as Carson Benton, approached them and asked if they could pay him for information about marijuana. A. 56. Anderson agreed to "take it up with my boss," A. 56, and Benton took them and pointed out the sailboat on a sandbar about a quarter of a

mile away. A. 31, 56-57. Benton then showed them a napkin with a half a gram of marijuana in it, saying, "If it's marijuana that boat is loaded." A. 57. Benton did not tell the officers where he had gotten the marijuana, or how he concluded the boat had marijuana aboard, A. 26, 27-28, 40, 57-58, nor was he asked how he obtained his information. A. 26-27, 57. Neither officer had seen or talked to Benton prior to this occasion. A. 24, 55, 65.

Anderson called Georgetown Sheriff Carter to join them and, after meeting at a nearby intersection, took him to a spot where they could view the boat, A. 28, 29, 40, 58, 59, after which the Sheriff summoned a deputy and boat. A. 59.

Customs had received a call on the sailboat, A. 74-75, 82, and sent three officers to investigate, with instructions to set up surveillance. A. 85, 123. Upon arr-

iving, they joined the other officers, A. 29, 59-60, 75-76. The Customs officers had no knowledge of where the boat came from or how it came to be grounded on the sandbar; they did not know who owned the boat and made no effort to ascertain this. A. 73, 86-88. After finding the tide too low to launch the boats, the officers traveled back up through Garden City and to the point where Benton had met Anderson and Johnson, where they could launch the boats. A. 29-30, 42-44, 60.

The Customs officers indicated their desire to set up surveillance of the boat. A. 124. Sheriff Carter, however, insisted on an immediate search, and, despite being told by a Customs officer that he would need a search warrant, A. 337, ¶¶2, 9, 10, indicated that he already had some marijuana from the boat, and had a boat on the way out to unload it. A. 124. Although they went

along to assist Carter, Customs officer Southern felt they "didn't go on there as far as Customs was concerned." A. 337, ¶¶2-4.

The Desiderata-D which was "stuck up on the sandbar" was approached on foot by the officers, who had to leave their boats and wade the last stretch because the tide was out, and boarded. A. 24-30, 42-43, 60. After boarding, the officers noticed a strong smell of marijuana on the boat. Finding that all the hatches were secured, they broke a lock off the main hatch, entered and seized the contents, A. 32, including pictures later found to show Petitioner Batty. A. 319-330. This was all carried out without a warrant, despite the large number of officers involved, and the passing of some four hours between the tip and the warrantless search on a weekday afternoon. A. 21-22, 61.

Rejecting the Government's contentions that Petitioners did not have standing because the boat had been abandoned, A. 162-64, 168, and a Customs-border search rationale because the search was "made under the direction and at the insistence of Sheriff Carter." A. 168, the District Court found that the warrantless search was justified by exigent circumstances due to the need to post a guard while a warrant was procured, A. 170, 197-98, and that the boat was threatened by "the whims of the water and the tide and the wind and the sea." A. 198-99. Similarly, the Court of Appeals ruled that the warrantless search was justified by exigent circumstances relating to the condition of the Desiderata-D, stating:

> She had no line ashore, no anchor, indeed no moorings of any sort. Heeling at about 45 degrees with the tide, to all <u>appearances</u> she was quarry both to storm and stealth, to be carried out to sea or to the bottom, or towed to a more ready location for the dis-

> charge or dispersing of drugs. App., p. 8a. (Emphasis in original.)

The Opinion contained no citation to the record for these findings.

Petitioner Hensler also challenged the legality of a warrantless search of his luggage at a security gate at the Pittsburgh, Pennsylvania airport, some six weeks prior to the seizure of the Desiderata-D. A. 244-61. Officer Marx testified that Hensler's bag was opened over his protest because he had entered the security area. A. 252. Marx questioned Hensler about the money, and submitted a report to the F.B.I. A. 247. The Court denied the Motion, A. 261, and subsequently considered testimony concerning Hensler's statements in its decision to convict Petitioner Hensler. A. 291, 304.

Petitioner Batty moved to suppress an oral confession taken some two months prior to trial when he was arrested for a traffic

offense and an outstanding warrant was found. A. 202. After being released when his traffic case was continued, Batty was arrested and handcuffed outside the courtroom by DEA Agents Simkins and Boeri. Batty's rights were read to him and the agents put him in a car to transport him to Boston. Simkins asked Batty if he had an attorney, and he replied that he did, but that he was not present, although he had been contacted. A. 207. During the drive, the agents questioned him about the pending charges in South Carolina, eliciting a detailed account of the offense. A. 209. Upon arriving in Boston, Batty refused to write out a confession, and only signed a waiver form after significant alterations. A. 214-17. Batty testified he had had no sleep the night before due to the subfreezing temperature in his jail cell, A. 225, and that he made the statements only after

Agent Simkins assured him the conversation was "off the record," A. 231, which Batty believed was "a general conversation and couldn't or wouldn't be used against me." A. 231. The Court found that the confession had been given after a valid Miranda warning and was made voluntarily. A. 240-42.

The District Court denied Petitioners' pretrial motions and, at a bench trial, subsequently convicted Petitioners on all counts. The Court of Appeals for the Fourth Circuit affirmed, addressing in its Opinion only the issue relating to the warrantless search of the Desiderata-D. App. A.

REASONS FOR ALLOWING THE WRIT

I.

THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT AND THE FOURTH AMENDMENT TO THE CONSTITUTION IN UPHOLDING THE WARRANTLESS SEARCH OF THE CABIN OF A GROUNDED SAILBOAT IN THE ABSENCE OF BOTH PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES.

After hearing testimony, the District Court orally denied Petitioner's Motion to Suppress the search and seizure of the Desiderata-D some 18 to 24 hours after it ran aground on a sandbar in intercoastal waters near Murrell's Inlet, South Carolina. A. 156, 74. The District Court held that the actions of the officers were justified without a search warrant due to what the Court felt were exigent circumstances. A. 199. In reaching this decision, the District Court rejected the Customs-border search rationale, A. 168, and alleged abandonment theories, A. 167-168, advanced by the Government, A. 182-186, 162-164, and also found that both Petitioners had standing to contest the search of the boat. A. 168. The Court of Appeals affirmed this decision, adding its own interpretation of what exigent circumstances existed. App. A., p. 8. Petitioners respectfully submit that these

Opinions are contrary to the decisions of this Court and contrary to the Fourth Amendment to the Constitution for two reasons. First, that the information known to the officers at the time of boarding fell far short of probable cause and was based entirely on the unsubstantiated tip of an unproven informant. Second, that even assuming arguendo that the officers had sufficient probable cause, there was ample time and opportunity to attempt to obtain a valid search warrant for the boat.

A. Probable Cause

In a definition still viable thirty years since its writing, this Court defined probable cause in the following manner in Brinegar v. United States, 338 U.S. 160 (1949):

> [I]t has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the off-

> icers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Id. at 175, 176.

Where the officers have received information from an informant on which they base all or part of their belief of probable cause, this Court has held there must be a sound basis for concluding that the information is credible or his information reliable and also it must state the underlying circumstances from which the informant obtained his information. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). Absent such background information, the officers must verify the credibility of the informer and tip through corroborating circumstances. Draper v. United States, 358 U.S. 307 (1959).

A careful review of the record below demonstrates that the Government's showing

in the instant case as to both probable cause and the basis for relying on the informant's tip were deficient under these well-established standards.

The Desiderata-D first came to law enforcement's attention from a telephone tip at about noon the day of the search. A. 20-23. Before this, neither the officers, nor any of their agencies had any information on the boat at all. A. 23, 58, 62, 73. The officer had never met or used their tipster before, A. 47, 55, 65, and, after lunch, drove 26 miles to meet him. A. 24. Before providing any information to the officers, Benton "asked if we could pay him some money for some information, how much money we could pay him." A. 56. Anderson said he would take it up with his boss. A. 56. Benton took them to the point and identified the Desiderata-D which was grounded on a nearby sandbar. Id. Then, as described by

Anderson, Benton showed them something:

> He had a Kleenex or a small piece of paper, soft like this, and he had maybe a half a gram, not hardly half a cigarette, the amount it would take to roll a cigarette; and he said what does that look like? I said it looks like marijuana. He said if it's marijuana that boat is loaded. A. 57. (Emphasis added.)

Benton did not indicate the marijuana "sample" came from the boat, or how he came to his conclusion that the boat contained marijuana.[3] Nor did either officer make this vital inquiry of Benton, as Johnson testified:

> Q: And what if anything did he [Benton] tell you in addition to giving you the napkin and saying it had come from the boat?
> A: [Johnson]: I don't believe he said it came from the boat.

---

[3]That the "sample" actually came from the Desiderata-D is questionable in light of its locked condition when boarded by officers that afternoon, a doubt that even Customs Officer Southern expressed. A. 337, ¶12.

> He just asked us do you think this is marijuana. A. 26. (Emphasis added.)
>
> Q: Would you state whether or not he told you he had been on the boat, or do you recall?
>
> A: I don't recall. He said marijuana. That was it. A. 27.

Anderson testified almost identically on this critical point:

> Q: Did he tell you how he had come into possession of that sample?
>
> A: [Anderson]: I did not ask him. A. 57. (Emphasis added.)

Nothing the officers observed or did subsequent to this meeting corroborated in any way the substance of the Benton tip. Nothing about the "sample" of marijuana--its quantity, color, or other characteristics--indicated the marijuana came from the boat (which even Benton did not state). Benton did point out a sailboat, which, as both officers could readily observe, was indeed grounded on a nearby sandbar. A. 57. This, of course, is no reason to believe that it contained marijuana, and did not

corroborate Benton's tip that it did.

The officers did not determine from where the boat had come, nor did they know, or attempt to ascertain, the ownership of the vessel prior to boarding. A. 86, 87.

The deficiencies of the Government's showing of Benton's reliability are fatal. Where the officers, as here, do "not know the informant it would be impossible for [them] to vouch as to the informer's reliability." McCreary v. Sigler, 406 F.2d 1264, 1269 (8th Cir. 1969). See also, Aguilar, supra, and Spinelli, supra. When an informant is further motivated by efforts to obtain financial reward, his information and reliability require even more careful scrutiny. Here, Benton requested money even before speaking with the officers, A. 56; after the seizure, he called Anderson seeking his "reward," A. 65, and Anderson was "sure" that Benton received some money. A.

66. See also, Note, The Supreme Court, 1968 Term, 83 Harv. L. Rev. 62, at 181 (1969).

Benton clearly fit into this category. He was not a victim or a bystander eyewitness reporting to the police what he had suffered or observed, where the underlying circumstances demonstrate his first-hand knowledge. Cf., United States v. Bell, 457 F.2d 1231, 1238-39 (5th Cir. 1972); McCreary v. Sigler, supra. From the officers' perspective, he was an unknown individual, who had never previously furnished information nor been proven reliable, who approached the officers, unsolicited, and sought to sell them information. His cooperation came only after Anderson promised to take the matter of payment up with his boss. A. 56.

The informant here also fails under the second crucial prong of the Aguilar test. There must be an allegation that the

informant personally observed the illegality, or:

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation...[or] obtained from an offhand remark heard at a neighborhood bar...[or fabricated] out of whole cloth. Id. at 416-17.

The officers did not even determine from Benton if he had been on the boat, A. 27, or the location from which he obtained the tiny quantity of marijuana he showed them. ["I don't believe he said it came from the boat."] A. 26. See also, A. 57.

When the information available to the officers at the time they boarded and searched the Desiderata-D is analyzed, it falls far short of the requisite showing of probable cause as defined in Brinegar, supra.

This search was based on the uncorroborated statement of Benton in describing the "sample" of marijuana, "...if it's marijuana that boat is loaded." A. 57. Such a conclusory assertion by an unproven informant without any corroboration was insufficient probable cause to board and search the Desiderata-D, and the District Court erred in failing to grant Petitioner's Motion to Suppress.

B. Exigent Circumstances

This Court has repeatedly recognized that "[W]arrantless searches are per se unreasonable unless they fall within some established exception to the warrant requirement,..." See, e.g., United States v. Chadwick, 433 U.S. 1 (1977); Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Michigan v. Tyler, 436 U.S. 499, 508 (1978). See generally, Coolidge v. New Hampshire, 403 U.S. 443, at 455 (1971).

In denying Petitioner's Motion to Suppress in the instant case, the Courts below specifically relied on a finding of exigent circumstances. A. 199. A careful review of the record, however, indicates that such a finding is not justified by the testimony of the officers who carried out the warrantless search because the Government failed to meet "the stringent burden...of bringing itself within one of the narrowly drawn exceptions and of showing the exigencies of the situation made it imperative to proceed 'outside the judicial process, without prior approval by judge or magistrate.'" United States v. Resnick, 455 F.2d 1127, 1131 (5th Cir. 1972).

The events leading to the search of the grounded sailboat commenced with the telephone tip at about noon from Benton to Detective Johnson, who was in his office at the Horry County jail, directly behind the County Courthouse. A. 21, 22.

The officers were eventually directed by Benton to a point from which they could view the Desiderata-D on a sandbar, about one-quarter mile away, A. 57, where it had been stranded since its grounding some 18-20 hours before. A. 156. The boat "was tilted over--not on its side, but it was tilted." A. 68. Anderson confirmed that the boat was "[s]tuck up on a sandbar," Id. Customs Officer Puig, who was the only officer to state that he had some familiarity "with boats and things of the sea" A. 88, agreed that at the time he boarded it the boat was not mobile. A. 88-89.

The Customs officers had instructions from their supervisor to set up surveillance on the boat to identify anyone trying to get on the boat. A. 76, 85-86, 124. However, according to Customs Officer Southern, Sheriff Carter insisted on searching the boat immediately:

> Well, we told him that we would like to do it. He said, well, it's not necessary since he already had a boat in the water with a deputy and that he was going to unload the boat, unload the vessel. A. 124.

See also, Defendants' Exhibit 10. A. 337, ¶8.

When the officers arrived, they boarded it, checked the hatches and found it "locked up and secured." A. 77. Puig testified that after boarding the vessel he noticed "a strong odor of marijuana." They broke off the lock on the main hatch and began to remove the contents. A. 77-79.

At the conclusion of testimony on Petitioner's Motion, the District Court indicated its intention to deny the Motion on the basis of exigent circumstances, with the following comments:

> THE COURT: ...Now, gentlemen, here you have a boat that is lying on its side subject to the sea, the tide, subject to somebody coming aboard it. The Sheriff knew it

> had marijuana in it. The whole boat was being torn up by the tide or carried out to sea or the material in it was destroyed and the boat blown up or anything happening, anything could happen. I can't imagine a more exigent situation that existed at that moment when the Sheriff wanted to go out. I'll be glad to hear from you. I can't understand more exigent situations than existed at that time. A. 168.

Although the Court admitted recognizing that there was no testimony from the officers to the effect that they perceived these emergency conditions and acted because of them, A. 189, 197, the Court nonetheless felt that the search was justified by the exigencies.

One of the "few specifically established and well-delineated exceptions," Coolidge, supra, at 455, to the warrant requirement is based on the concept of mobility of the subject area to be searched. This exception, as applied to searches of attended, operable vehicles stopped on the

open highway was announced in Carroll v. United States, 267 U.S. 132 (1925).

In Chambers v. Maroney, 399 U.S. 42 (1970), this Court stated:

> Neither Carroll, supra, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords ...Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. Carroll, supra, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible. Id. at 50-51.

The mere fact that a potentially mobile vehicle, such as an automobile, is involved does not justify action without a warrant. "[T]here is no general automobile exception to Fourth Amendment requirements. The movable nature of an automobile is not

enough. There must be exigent circumstances as well." United States v. Fogelman, 586 F.2d 337, 342 (5th Cir. 1978); accord, Coolidge v. New Hampshire, supra, at 462 (1971); United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974); United States v. Young, 489 F.2d 914, 916 (6th Cir. 1974). As this Court has held, the exigent circumstances exception to the warrant requirement is "carefully defined to require the presence of circumstances indicating the risk of loss of evidence." United States v. Bradshaw, supra, at 1103. There must be a real "emergency" based on the "special facts" of the particular case. Schmerber v. California, 384 U.S. 757, 770-71 (1966).

The exigent circumstances rationale may apply to a "moving vessel" as well as to a moving automobile. United States v. Freeman, 579 F.2d 942, 948 (5th Cir. 1978). In United States v. Carabello, 571 F.2d 975

(5th Cir. 1978), the Court approved a search of the vessel based on probable cause without a warrant because it was in fact mobile, being actually underway like an automobile on a highway, Chambers v. Maroney, supra, and because of

> ...the exigent circumstances surrounding the events in question. An immediate search was reasonably undertaken in view of the inclement weather, the increasing darkness, the vessel's unknown destination on the Florida coast and the consequent danger that the vessel and its suspected contraband would escape interception. Carabello, supra, at 977.

In each and every analysis applying the exigent circumstances rationale, the critical factor is the actual, rather than potential, mobility, as discussed in United States v. Martin, 562 F.2d 673 (D.C. Cir. 1977):

> [T]he inherent mobility of the object to be searched cannot, without more, justify a failure to secure a warrant. The question in each case is not simply

> whether the item searched is movable; rather, the question is whether, in light of the 'realities of the situation,' there was a reasonable likelihood that the item would be moved before a warrant could be obtained. Where the possibility of movement is only remote or speculative, the police are simply not confronted with the kind of urgency which would excuse them from the warrant requirement. Id. at 678. (Emphasis added).

The burden of proof in advancing this limited exception is on the Government, and it is a "stringent burden...of showing the exigencies of the situation made it imperative to proceed" without a warrant. United States v. Resnick, supra, at 1131.

In the instant case, the Government clearly failed to meet such a burden. As the Court recognized, "there was no testimony from Sheriff Carter or no testimony from any witness that he went aboard because he thought the boat would be taken up by the tide and something would happen to the...

[evidence]." A. 189; see also, A. 197.

There was no testimony at all that indicated the stranded boat was menaced by the tides, winds, or weather conditions. The witnesses uniformly described the tide as low, with the boat sitting up on the sandbar. A. 56, 68, 71, 77, 78. Moreover, as the Court found, the boat had been at that same location for approximately 18-20 hours. A. 156. The boat was easily observed from numerous vantage points. A. 57, 59, 60.

The officers' own actions belie either the existence or feeling of an emergency justifying an immediate, warrantless search. The initial tip arrived at about noon. Before checking it out, the officers: stopped for lunch, made telephone calls, talked with their informant Benton, viewed the boat, called Sheriff Carter, met the Sheriff, viewed the boat again, called in a boat and

other officers, tried unsuccessfully to launch the boats, moved to another location across the inlet, and only then boarded and broke into the locked boat, at approximately 4:00 P.M.

In light of the entire record, the Government clearly failed to make a sufficient showing of exigent circumstances. Their "stringent burden" was not met, as they failed to produce any testimony establishing a real and present danger to the potential evidence contained in the Desiderata-D. The Court's own comments in ruling indicate that the best the finder of facts could characterize the Government's showing was that it created inferences of potential exigent circumstances. See especially, comments at A. 197-99. See also, A. 195-96. Inferences do not meet the requisite constitutional standard of preponderance of the evidence, Coolidge, supra, and these com-

ments illustrate the failure of proof submitted by the Government in meeting its burden.

Further, there is an indication in the record that the District Court's finding of exigent circumstances may have been based on an erroneous legal standard. The Court twice stated its belief that:

> ...some of the cases hold that at least I know the Fourth Circuit cases hold that in an automobile case if you have to place a guard there, that's just as much an exigent situation in that that in itself creates an exigent situation. A. 170. See also, A. 197-98.

This is neither the law of the Fourth Circuit nor the law of the land as established by the precedents of this Court. See United States v. Bradshaw, supra, at 1102-1104; Coolidge v. New Hampshire, supra, at 461.

The underlying concept implicit in all of the vehicle cases is that of mobility, and that this mobility would deprive the

officers of the opportunity to obtain a search warrant without risking loss or destruction of the evidence. Coolidge v. New Hampshire, supra. See also, Chadwick, supra, and Arkansas v. Sanders, 442 U.S. 753(1979). The opportunity to obtain a search warrant without any risk of such loss was evident in the instant case. Sheriff Carter, A. 168, simply and deliberately decided not to get a search warrant. At least one of the officers on the scene, Customs Officer Southern, disagreed with this decision and testified as to his unsuccessful efforts to discuss it with the Sheriff. A. 124; 125; 337, ¶8. Southern also directly asked Sheriff Carter "what authority he had to go aboard it without a warrant..." A. 337, ¶2, and indicated that he felt the Sheriff should have gotten a warrant. Id., ¶¶9-10.[4]

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[4]Southern's comments appearing in the transcript, Defendants' Exhibit 10, A. 333-38, were incorporated into the record without objection. A. 313.

The instant case presents facts strikingly similar to those presented to the Fifth Circuit Court of Appeals in United States v. Caraway, 474 F.2d 25 (5th Cir. 1973), vacated on other grounds, 483 F.2d 215 (5th Cir. 1973). Caraway involved the warrantless search of the defendants' unoccupied houseboat. The agents arranged a controlled delivery of marijuana to the defendants at the marina where their boat was located. The boat was unoccupied, and one of its engines was dismantled on the dock, suggesting that the boat might have been inoperative. The Court held that the search, aside from being based on questionable probable cause, was invalid because it was conducted without a warrant (id. at 31), specifically stating that "there was no danger that the suspect vehicle would escape from the jurisdiction," citing Chambers v. Maroney, supra, and emphasizing that the

Customs officers did not "possess any reliable information suggesting the necessity of an immediate search." (Id.)

The instant case presents just such a situation: the Desiderata-D was immobile and not threatened by any forces which could result in the destruction or removal of it or its contents. As the Court in United States v. Martin, supra, stated in similar context:

> '[T]he very term "exigency" commands that analysis be shaped by the realities of the situation presented by the record.' And in the present case, the record simply does not reveal a situation of unusual urgency. On the contrary, the record makes it clear that the agents here had ample opportunity to secure a warrant; and that the 'realities of the situation' were such that a warrant could have been obtained without imperiling either the safety of those involved, or the investigation itself. Id. at 677.

The insufficiency of the showing as to exigent circumstances and the unexcused and deliberate failure of the officers to obtain

a search warrant prior to boarding the Desiderata-D rendered the officers' boarding, search, and seizure of the vessel and its contents illegal. As a consequence, the District Court erred in denying Petitioners' Motion to Suppress.

II.

THE DECISION BELOW IS CONTRARY TO THE DECISION OF THIS COURT AND WELL-FOUNDED PRINCIPLES OF APPELLATE REVIEW IN THAT THE EVIDENCE FAILS TO SUPPORT THE OPINION OF THE COURT OF APPEALS.

In its Opinion, the Fourth Circuit concluded that the search of the Desiderata-D was justified on the basis of "exigent circumstances," App., p. 3a. and, due to this fact, the officers were justified in carrying out an "immediate seizure of the vessel," id., p. 7a, without first obtaining a search warrant. The Opinion eloquently articulates the following exigent circumstances in justifying this conclusion that

an immediate, warrantless search was required:

> The Sheriff's and agents' assessment of the situation as exigent becomes manifestly accurate upon allusion to the hazard of the Desiderata-D. She had no line ashore, no anchor, indeed no moorings of any sort. Heeling at about 45 degrees with the tide, to all appearances she was quarry to both storm and stealth, to be carried out to sea or to the bottom, or towed to a more ready location for the discharge or dispensing of drugs. Id., p.7a-8a. (Emphasis in original).

Indeed, upon reading the foregoing, one might well ask, what more exigent circumstances could exist? When would a warrantless search ever be more necessary or justified?

The singular flaw in the Court's approach is that the above description is without basis in the Record upon which it ostensibly relies (and to which it fails to cite, on any occasion, as basis for the facts recited). Even more tellingly, when

that Record is reviewed, a full and fair reading requires the conclusion that the foregoing is not only baseless, but is, in fact, contradicted at every point critical to the finding of exigent circumstances under controlling legal authority.

First, the Opinion alludes to "[t]he Sheriff's and agents' assessment of the situation as exigent..." Id., p.7a. Not one word of testimony at the Motion to Suppress (where four officers testified to the circumstances surrounding the seizure) was to the effect that any officer boarded the vessel and searched without a warrant because of a fear that evidence was in danger of being lost or removed. The District Court recognized this critical absence in its comments:

> THE COURT: Well, I agree there was no testimony from Sheriff Carter or no testimony from any witness that he went aboard because he thought the boat would

> be taken up by the tide and something would happen to the---. A. 189; see also A. 197.

Moreover, at least one officer at the scene, Customs Officer Southern, argued with fellow officers at the scene against the decision for an immediate search, asking the Sheriff, "...what authority he had to go aboard it without a warrant..." A. 337, ¶2.

Further, the actions of the officers themselves clearly belie the District Court's statement that the officers assessed the "situation as exigent." App., p. 7a. as set forth in detail above, supra, pp. 7a-10a.

A full and fair reading of the Record below further demonstrates the reason behind the inability of the Opinion to cite to supporting testimony for its conclusion that there were exigent circumstances: no such evidence is contained in the Record. The Opinion of the Fourth Circuit is accurate

when it states that the vessel had no "moorings" or "line ashore." App., p. 8a. However, the Opinion fails to confront the irrelevancy of this lack of restraints: the boat was, in fact, high and dry on a sandbar. When the vessel was boarded and searched by the officers, it "...was aground. The tide was I guess just about out. There wasn't much water around the boat." A. 77. Customs Officer Puig, the only officer familiar with maritime vessels, agreed that at the time the Desiderata-D was boarded, it was not mobile. A. 88-89. In fact, the boat was grounded on such a shallow sandbar that when the officers finally went out to board it, they had to park their boat some distance away and walk up to the boat. A. 24-30, 42-43, 60. To claim, as the Opinion does, that the lack of moorings to shore proves exigent circumstances in the instant case is tantamount to the Court

finding in Bradshaw, supra, that exigent circumstances were proved there by the fact that the truck parked in the defendant's back yard did not have any money in the parking meter.

Nor does one word of testimony exist in the Record as to any threat of tide, storm, stealth, or towing. In fact, the Record clearly reflects that the boat had been in that exact location, in that exact condition for some 18-20 hours previous to the "emergency" search. A. 156.

In regard to the danger of removal, the Court's Opinion is again contradicted by the Record: the boat was easily surveilled by the numerous officers from numerous vantage points, A. 57, 59, 60, and, as the Court's Opinion recognized at page 4, the vessel was unattended when it was boarded. Moreover, these factors are strongly supported by the fact that Customs officers

determined, and had in fact been ordered to set up surveillance rather than search the boat, so as to determine who was involved with it. This was obviously a contributing factor to Officer Southern's dispute with the Sheriff over his desire to effect an immediate search without a proper warrant. A. 76, 85-86, 124, 337.

This Court's decision in United States v. United States Gypsum Co., 333 U.S. 364 (1948) long ago established the ground rules for appellate review of fact findings: findings of fact will not be set aside unless "clearly erroneous." "A finding is 'clearly erroneous' where although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. at 395. It follows that a "clearly erroneous" ruling is demanded where there is a total absence of evidence. See

Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59 (1978).

Similarly, this Court stated in Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976) that "[i]t is not our place, however, to reappraise the evidence, unless it plainly fails to support the findings of the trier of facts." Id. at 758 (emphasis added).

Petitioners' case presents just such a situation. The District Court, when discussing its decision based on "exigent circumstances" clearly admitted there was "...no testimony from any witness that he went aboard because he thought the boat would be taken up by the tide and something would happen to the---." A. 189. The Court of Appeals, instead of examining the record (especially in light of this admission by the District Court) to determine if any factual basis existed, chose to amplify the

speculation as to possible exigent circumstances by discoursing on the many possibilities of emergencies that could arise if the situation were different from the one actually testified about. Both descriptions, and their conclusions of the existence of probable cause, are clearly contradicted by the factual record in this case, and the evidence plainly fails to support the findings. A full and fair reading of the evidence in this case demands a conclusion that a mistake has been made, and relief must be granted. To do otherwise erodes well-founded principles of appellate review and approves a conviction and sentence of incarceration based on a factual determination unsupported by the evidence in the case. In order to preserve meaningful access to appellate review of factual findings by trial courts in criminal cases, somewhere, sometime, a line must be drawn. Petitioners'

case presents a clear and compelling factual record for just such a determination, and review should be granted to insure these important principles of law.

III.

THE DECISION BELOW AS TO THE WARRANTLESS SEARCH OF PETITIONER HENSLER'S LUGGAGE AT AN AIRPORT SECURITY GATE IS CONTRARY TO WELL-ESTABLISHED PRINCIPLES OF FOURTH AMENDMENT LAW AND CONTRIBUTES TO A CONTINUING AND CLEAR CONFLICT BETWEEN THE DECISIONS OF THE VARIOUS COURTS OF APPEALS ON THIS ISSUE.

Prior to trial, Petitioner Hensler filed a Motion to Suppress relating to the warrantless search of his luggage at a security gate at the Pittsburgh, Pennsylvania airport on July 12, 1977. At the hearing on Petitioner's Motion, Allegheny County Police Patrolman Marx testified that while on duty at the Pittsburgh airport on that date, he was notified by a security guard that a bag had been opened because, as the guard re-

ported to Marx, the operators could not determine its contents from the x-ray machine, which showed "...just one black spot throughout the suitcase..." A. 246. Officer Marx did not personally observe anything until after Petitioner Hensler's bag had already been opened and a large sum of money found inside. A. 251. Marx never heard Hensler give permission to search his bag, A. 252, recalling that, "There was something about he didn't want to open the bag and..[the security guard] was explaining to him he had to open the bag once he was in the security area." A. 252. Marx further testified to Hensler's evasive answers concerning the money, improper identification and his destination (Fort Lauderdale, Florida), and that he filed a report containing this information with the F.B.I. This evidence subsequently became the first overt act in Petitioner's indictment, A. 9(2), and the test-

imony of Officer Marx was considered in the Court's decision at Petitioners' bench trial. A. 291, 304.

At the same hearing, Petitioner Hensler testified that after he placed the bag on the conveyer to the x-ray machine and walked through the magnetometer, "[The security guard] said I have to open this, and almost instantaneously she opened up the suitcase;" A. 255. On cross-examination, Hensler admitted to having flown in and out of airports before, but stated he was "...not that well knowledgeable as to what the wording is" on signs at security gates. No proof was ever submitted as to the existence of any signs at the airport where Petitioner was searched.

The District Court denied Petitioner Hensler's Motion to Suppress, specifically relying on the Fourth Circuit's then-recent decision in United States v. DeAngelo, 584

F.2d 46 (1978), cert. denied, 440 U.S. 935 (1979), holding that similar circumstances are "sufficiently suspicious" to authorize a limited examination of luggage to determine if a gun or explosives posing "an immediate danger" are present. DeAngelo also held a valid consent based on warning signs in the airport. A. 261. On appeal, the Fourth Circuit found this contention to be "without merit" and failed to dismiss this point raised or to cite authority.

Searches at airport security gates have been upheld pursuant to themes of: probable cause plus exigent circumstances, United States v. Lopez, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971); consent, United States v. DeAngelo, supra; stop and frisk under Terry v. Ohio, 392 U.S. 1 (1968), see United States v. Epperson, 454 F.2d 760 (4th Cir. 1972); and pursuant to special concerns embodied in the FAA hijacker profile, United

States v. Slocum, 464 F.2d 1180 (3d Cir. 1972). See generally, Note, 72 Mich. L. Rev. 128 (November 1973); "Validity, Under Federal Constitution, of Preflight Procedures Used at Airports to Prevent Hijacking of Aircraft," 14 A.L.R. Fed. 252 (1971).

The Ninth Circuit has undertaken the most detailed analysis of this area, with a series of holdings in direct conflict with the approach in the Fourth Circuit. That Circuit has vigorously applied existing standards enunciated by this and other Courts in analyzing consent, principally the "totality of the circumstances" test established by the Court in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Of particular importance to this analysis in relation to airport searches is as to the existence of an opportunity for the passenger to decline a search and leave the boarding area. United States v. Homberg, 546 F.2d

1350 (9th Cir. 1976), at p. 1352. In a Ninth Circuit case with circumstances very similar to those here presented, that Court held a warrantless search invalid due to a failure of the Government to meet its burden of demonstrating a knowing and voluntary consent. United States v. Davis, 482 F.2d 893 (9th Cir. 1973). See also, United States v. Henry, 615 F.2d 1223 (9th Cir. 1980).

A number of Circuit Courts of Appeals have held that the passenger's knowledge of a right to withdraw from the area to avoid a search is a prerequisite to a valid search, or at least an important factor in the "totality of circumstances" test of consent. United States v. Albarado, 495 F.2d 799 (2d Cir. 1974); United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973); United States v. Clark, 475 F.2d 240 (2d Cir. 1973); Singleton v. Commissioner of Internal Revenue, 606 F.2d 50 (3d Cir. 1979); United

States v. Freeland, 562 F.2d 383 (6th Cir. 1977). The Eighth Circuit has held that posted warnings at airports advising passengers that they are subject to search "...did not constitute consent 'in any meaningful sense.'" United States v. Kroll, 481 F.2d 884, 886 (8th Cir. 1973).

As set forth above, the Fourth Circuit does not recognize the passenger's knowledge of the right to withdraw without a search in undertaking an analysis of consent. Similarly, the Fifth Circuit has held that "...those who actually present themselves for boarding on an air carrier, like those seeking entrance into the country, are subject to a search based on mere or unsupported suspicion." United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973).

Petitioner Hensler presents a factual record demonstrating a total absence of suspicious behavior such as would justify a

search under Terry, supra. Similarly, the record is totally devoid of any proof of Petitioner's consent to the warrantless search. The officers in the instant case clearly felt that anyone entering the security area had consented to a search, and there is clearly no right to withdraw without being subjected to a search. Finally, the search herein, and especially the subsequent interrogation of Petitioner, resulting in evidence introduced against him at trial, was far more intrusive than any search justified to protect passengers traveling on air carriers.

The clear factual record in Petitioner's case, the failure of the Fourth Circuit to confront the lack of authority under existing Circuit law to decide Petitioner's search, and, most importantly, the continuing conflict between the Circuits in this area establish strong grounds for granting certiorari in this case.

IV.

THE DECISION BELOW FAILED TO APPLY THE CORRECT CONSTITUTIONAL STANDARD IN ASSESSING THE ADMISSIBILITY OF PETITIONER BATTY'S CONFESSION IN THAT IT FAILED TO FIND A WAIVER OF THE RIGHT TO COUNSEL.

The District Court admitted Batty's confession finding that it had been given after a valid Miranda warning and was made voluntarily. A. 240-42. The Court of Appeals affirmed without discussion. It may well be argued that the confession itself was involuntary under due process standards. There has been no demonstration of voluntary waiver as required by Miranda v. Arizona, 384 U.S. 436 (1966). But aside from those constitutional guideposts, the courts below may well continue to articulate and evaluate the waiver standard only by reference to Miranda, in clear contravention of the independent Sixth Amendment protection. That right, asserted by this Court in Massiah v. United States, 377 U.S. 201 (1964)

and reiterated in Brewer v. Williams, 430 U.S. 387 (1977) and Rhode Island v. Innis, ___ U.S. ___, 100 S.Ct. 1682 (1980), demands that the Government, when on notice that an indictee is represented by counsel, scrupulously honor his right to counsel and demonstrate to a high degree a voluntary waiver of this right.

The uncontradicted testimony rendered in the case at bar clearly demonstrates that Petitioner Batty was interrogated while in the custody of Drug Enforcement Administration agents during a trip from Gardner to Boston, Massachusetts, while he remained handcuffed. As noted in the recent case of Rhode Island v. Innis, supra, at 1689:

> ...the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Having determined that an interrogation occurred, the Government failed to carry its burden in showing that the Petitioner understood and executed a voluntary waiver of his Sixth Amendment right to counsel. The record includes testimony by Petitioner that he had no sleep on the night before the interrogation as he was confined in a subfreezing jail cell, suffered from a condition of stress that had recently required hospitalization, A. 229, was arrested, handcuffed and interrogated by DEA agents. Testimony of DEA Agent Simkins verifies that the first discussion of a willingness to acknowledge and waive constitutional rights was in the Boston DEA office where the Petitioner refused to sign a waiver of rights, insisted on adding the language, "I do not choose to make any statements" and struck out language, thus evidencing his intention to exercise his

Fifth and Sixth Amendment rights. A. 214-17, Defendant's Exhibit 6.

It is uncontested that before the interrogation began, the Government agents were made aware that Petitioner was represented by counsel and that counsel had been contacted. A. 218, 231. Despite this awareness, the agents showed no hesitancy toward questioning their captive.

This conduct is clearly violative of Petitioner's Sixth Amendment rights as enunciated in Massiah v. United States, supra, and its progeny. This Court has held in Brewer v. Williams, 430 U.S. 387 (1977), that a positive and certain waiver must be shown by the Government. In deciding Brewer based on Sixth Amendment principles, this Court stated: "...once adversary proceedings have commenced against an individual, he has a right to legal representation when the Government interrogates him."

The Government bears a heavy burden to show that the defendant understood that in fact he had a right to the presence of counsel during an interrogation and that the defendant intentionally relinquished or abandoned that known right. See Brewer v. Williams, 430 U.S. 387 (1977); United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. 1978). The Courts indulge every reasonable presumption against waiver, and an inferred waiver of a constitutional right is disfavored. Estelle v. Williams, 425 U.S. 501 (1976).

In Brewer v. Williams, supra, the officer and his prisoner embarked on a wide-ranging conversation covering a variety of topics, resulting in damaging admissions by the defendant. The Supreme Court held that there was no reasonable basis for finding that the prisoner had waived the right to the presence of counsel. The Court recog-

nized that the police officer deliberately and designedly set out to elicit information from the prisoner just as surely as--and perhaps more effectively than--if he had formally interrogated him. The officer was fully aware that the prisoner was being represented by a lawyer in Des Moines.

In the case at bar, Batty was being represented by counsel, and this was known to Agent Simkins. The conversation during the ride from Gardner to Boston was deliberately and designedly for the purpose of eliciting information concerning his involvement in the charges then pending against him. Cf. Rhode Island v. Innis, supra.

Although Batty is an educated and intelligent man, the intelligence focused upon in Miranda and its progeny is the knowledge and understanding that the conduct in answering questions of the interrogating officer constitutes a relinquishment of a constitu-

tional right. Batty did not intend to waive his right to silence or counsel in discussing the charges with Simkins. This fact is strongly supported by the testimony of Simkins that Batty refused to sign a waiver of rights and specifically wrote upon the waiver form that he did not wish to make a statement and did not wish to waive a lawyer. This refusal to sign a waiver form or even to give an oral waiver constitutes a sufficient affirmative indication of the desire to assert Fifth and Sixth Amendment rights.

While the Court's decision in Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) is factually distinguishable from the case at bar, reference to the Court's analysis is illustrative. In Nash, the Court recognized that:

> where there is a request for an attorney prior to any questions, ...a finding of knowing and int-

> elligent waiver of the right to an attorney is impossible.... Id. at 517.

In that neither the trial court nor the Fourth Circuit Court of Appeals applied the facts of this case to the Sixth Amendment standard established by this Court in Massiah, supra, and Brewer, supra, review by this Court is appropriate in order to analyze the totality of the circumstances to determine whether the Government carried the heavy burden of demonstrating that Petitioner Batty knowingly and intelligently waived his right to counsel, and to clearly establish the applicability of this Sixth Amendment standard.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a Writ of Certiorari to review the judgment of the Fourth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and Appendix upon the Solicitor General, Department of Justice, Washington, D.C., 20530, and upon the Honorable Lionel Lofton, Assistant United States Attorney for the District of South Carolina, United States Courthouse, Meeting at Broad Streets, Charleston, South Carolina.

This 24 day of November, 1980.

JAMES K. JENKINS

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 79-5098

United States of America,

Appellee,

v.

John F. Hensler, Jr. and
Charles Batty,

Appellants.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Sol Blatt, Jr., District Judge.

Argued: February 2, 1980
Decided: July 23, 1980

Before BRYAN, Senior Circuit Judge, WIDENER and HALL, Circuit Judges.

James K. Jenkins (Stroup, Goldstein, Jacobs, Jenkins and Pritzker on brief) for Appellant John F. Hensler, Jr.; Bruce H. Morris (Devine & Morris on brief) for Appellant Charles Batty; (Morris D. Rosen and Robert N. Rosen, Rosen, Oberman & Rosen on brief) for Appellants; Lionel S. Lofton, Assistant U. S. Attorney (Thomas E. Lydon, Jr., U. S. Attorney on brief) for Appellee.

Albert V. Bryan, Senior Circuit Judge:

Convicted on each of the three counts of a joint indictment[1], respectively charging them with a conspiracy to import marijuana, 21 U.S.C. § 963, with the importation thereof, 21 U.S.C. §§ 952(a), 960; 18 U.S.C. § 2, and with the possession of marijuana with intent to distribute, 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2, John F. Hensler and Charles Batty appeal their sentences. Common to, and decisive of,

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1. Their trial, non-jury, was in the Federal District Court for South Carolina, but the third indictee, Michael C. Falker, had not been apprehended and was still a fugitive.

all these accusations is the issue of whether a grounded sailboat's cargo of 21,000 pounds of marijuana had been erroneously allowed in evidence at trial because it had been obtained by a search and seizure violative of the Fourth Amendment.[2] With the District Judge, we think not; though without a warrant, the search and seizure was made under exigent circumstances and was based upon probable cause. Hence, we affirm the convictions.

On the dominant issue, the proof, taken on a motion to suppress, was not in

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2. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Const. amend. IV.

dispute and, as material, it follows. A sailing vessel, the Desiderata D, on August 29, 1977, became stranded upon a sandbar at Murrell's Inlet, a domestic waterway located along South Carolina's seacoast, near Garden City. On the next morning, August 30--18 or 19 hours later--she was boarded by three men, John Wayne Strickland, Carson Benton and Bobby Strickland, employed or residing in the vicinity, who had learned of the vessel's presence in the Inlet. They apparently discovered marijuana stowed in the hold. Returning ashore, Benton telephoned the County Police Department and told Detective Johnson, a law enforcement officer of eight years, that he had information concerning marijuana aboard a sailing vessel in the Inlet.

That afternoon Detective Johnson, accompanied by a South Carolina Law Enforce-

ment Department agent, Anderson, met Benton at a Garden City fishing pier. He asked if they could pay him for some information about marijuana; then he told them of the Desiderata D. At the same time, he handed the officers a white paper napkin containing a small amount of marijuana, identified as such by Anderson and Johnson, the latter having worked with marijuana for the last eight years. According to Johnson, Benton told them the boat was "loaded down" with it.

Soon they were joined by County Sheriff Carter and a deputy, along with three Customs Patrol Officers who had previous information of the stuck boat. After circling the site from spot to spot ashore, surveying for the most advantageous approach, they determined, at the Sheriff's insistence, to board her. The boat was reached with a small boat and by

wading. Concededly without a search warrant, the Sheriff, the Customs Officers and State and County Officers scaled the deck and there whiffed a strong odor of marijuana, whereupon they broke the lock on one of the hatches and so exposed 21,000 pounds of contraband marijuana. The boat and its contents were then seized; there were no arrests since no one else was seen aboard.

The trial judge, as do we, rested his ruling upon the firmly precedented exception to the exaction of the Fourth Amendment: that exigent circumstances can justify a search and seizure by police authorities without a warrant. When the subject of the search is a movable vehicle, as contrasted with a fixed edifice, such exigency almost inevitably is present.

These cardinal points were early made in Carroll v. U. S., 267 U.S. 132 (1925):

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

Id. at 149.

In reviewing the testimony relating to the circumstances of the boarding and taking of the Desiderata D, we consider the evidence in the light most favorable to the Government. With this in mind, we hold the seizure on trial not to have been unreasonable but, rather, to have been upon such probable cause as to justify the boarders' belief that, in the circumstances confronting them as officers of the law, duty demanded their immediate seizure of the vessel.

The Sheriff's and agents' assessment of the situation as exigent becomes mani-

festly accurate upon allusion to the hazard of the Desiderata D. She had no line ashore, no anchor, indeed no moorings of any sort. Heeling at about 45 degrees with the tide, to all appearances she was quarry both to storm and stealth, to be carried out to sea or to the bottom, or towed to a more ready location for the discharge or dispensing of drugs.

The present application of these conclusions is not rendered unpersuasive or defeasible by the neglect of the officers to commission one of their number to obtain a search warrant while leaving the remainder to guard the vessel, a delinquency upon which this court vitiated the search in United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974). The Desiderata D's preservation and protection were impatient of hesitancy; opportunity for an intermission of effort to take her was not

assured.

As the Supreme Court has stated:

> [W]e know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a [vehicle] under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment.

Cardwell v. Lewis, 417 U.S. 583, 595 (1974).

Appellants further argue that the District Court erred in denying Hensler's motion to suppress evidence derived from a previous search of his luggage at an airport security gate, in admitting evidence of Hensler's possession of a large sum of money revealed in that search, and in admitting a confession obtained from Batty. In addition, appellants maintain that the evidence was insufficient to convict Hensler of importation and conspiracy to import marijuana. We find these

arguments to be without merit.

The judgments of the District Court on appeal will be sustained.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-5098

UNITED STATES OF AMERICA

Appellee

v.

JOHN F. HENSLER, JR.
and CHARLES BATTY

Appellants

O R D E R

There being no request for a poll of the court on the petition for rehearing en banc,

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition

for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Bryan and Judge Hall.

s/
For the Court

No. 80-841

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ALEXANDER L. ST
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN F. HENSLER, JR., AND CHARLES BATTY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

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JOHN F. HENSLER, JR., AND CHARLES BATTY, PETITIONERS

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the warrantless search of petitioners' sailboat was proper.

2. Whether a search of petitioner Hensler's suitcase at an airport security checkpoint violated the Fourth Amendment.

3. Whether petitioner Batty waived his right to counsel prior to making a statement to law enforcement agents.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 625 F. 2d 1141.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1980. A petition for rehearing was denied on August 26, 1980 (Pet. App. 1b-2b). The Chief Justice extended the time for filing a petition for a writ of certiorari to November 24, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the District of South Carolina, petitioners were convicted of conspiracy to import marijuana (21 U.S.C. 963), importation of marijuana (21 U.S.C. 952(a)), and possession of marijuana with intent to distribute it (21 U.S.C. 841(a)(1)). Petitioner Hensler was sentenced to concurrent terms of five years' imprisonment on the conspiracy and possession counts and a consecutive term of one year's imprisonment on the importation count, to be followed by a five-year special parole term. Petitioner Batty was sentenced to concurrent terms of four years' imprisonment on all counts, to be followed by a four-year special parole term. The court of appeals affirmed (Pet. App. 1a-10a).

The evidence at trial showed that petitioners, along with co-defendant Michael Falker,[1] attempted in August 1977 to smuggle more than 21,000 pounds of marijuana into this country from the Bahamas. Their scheme failed when their sailboat, which contained the marijuana, ran aground near Georgetown, South Carolina, and its cargo was discovered.

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[1]Falker was indicted but has avoided arrest.

Petitioner Batty, an experienced sailor, was recruited to captain a sailboat full of marijuana from the Bahamas to Maine (2 Tr. 63-65, 67).[2] He was first given an airplane ticket to Ft. Lauderdale, Florida, where he met Falker and other conspirators. Batty and Falker then flew to the Bahamas to pick up the already-loaded sailboat (2 Tr. 66-69). They sailed north, but because they were low on food supplies, they put the boat in at Georgetown on August 25, 1977 (2 Tr. 70-71, 146). Two days later, petitioner Hensler arrived. The three men then rented a cottage located on deep water in Murrell's Inlet, were they intended to unload the marijuana into Hensler's van (2 Tr. 72, 145, 173; 3 Tr. 14-15). On August 29, Batty and Falker attempted to move the boat from a marina to Murrell's Inlet, but the boat ran aground on a sandbar (2 Tr. 72-73, 187-188). An attempt to dislodge the boat failed, despite assistance by a Coast Guard helicopter and a local rescue force (2 Tr. 73, 188-190). The boat was left aground, where it listed at a 45-degree angle (Pet. App. 8a; 1 Tr. 76-77).

On August 30, three men went out to the boat and discovered that it contained marijuana (1 Tr. 127; Pet. App. 4a). One of the three, Carson Benton, contacted Detective Johnson of the local police, showed him a small quantity of marijuana, and told him that the boat was "loaded down" with the substance (1 Tr. 47, 76-77; Pet. App. 4a-5a). Detective Johnson alerted the county sheriff, who ultimately directed that the boat be boarded and searched (1 Tr. 144-145; Pet. App. 5a). The marijuana was seized and unloaded by the police and Customs officers (1 Tr. 51-52, 81, 97-99) while petitioners watched from a secluded spot on shore (2 Tr. 73). Petitioners were later identified and arrested.

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[2] "Tr." refers to the three volumes of hearings and trial, conducted jointly.

ARGUMENT

1. Petitioners contend (Pet. 14-48) that the search of the boat violated the Fourth Amendment because it was not supported either by probable cause to believe that contraband was aboard or by sufficient exigent circumstances to permit a search without a warrant. Both courts below, however, after careful review of the peculiar circumstances of this case, found against petitioners on these fact-bound claims. Further review is therefore unwarranted.

Petitioners argue (Pet. 19-20) that probable cause was absent because Detective Johnson apparently failed to ask Benton specifically whether his sample of marijuana came from the boat. However, as the overall context of their conversation plainly shows, the officer was justified in believing that the marijuana that Benton produced in fact came from the boat. Benton gave the officer a small sample; he then said that if it was marijuana, the boat was "loaded down" with a truckload of it (1 Tr. 47, 76-77). Viewed in a commonsense fashion, the clear inference to be drawn from Benton's statement was that he had obtained the marijuana from the boat.

Petitioners also assert (Pet. 17, 21-22) that probable cause was lacking because there was no basis for concluding that Benton was a reliable informant. But, unlike most narcotics informants whose credibility may often be suspect because of their own involvement in illegal activity, Benton was an ordinary citizen, with no motive to falsify, who came forward to report his discovery of evidence of a crime. The courts have recognized that the requirement that the police have specific information concerning the credibility of their informants (see *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969)) should not be inflexibly applied in cases where the informant is a witness with no criminal background. See, *e.g.*, *Jaben* v. *United States*, 381 U.S. 214, 224 (1965); *United States* v. *Swihart*,

554 F. 2d 264, 268-269 (6th Cir. 1977); *United States* v. *Rollins*, 522 F. 2d 160, 164 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976); *United States* v. *Darensbourg*, 520 F. 2d 985, 988-989 (5th Cir. 1975); *United States* v. *Spach*, 518 F. 2d 866, 870 (7th Cir. 1975); *United States* v. *Burke*, 517 F. 2d 377, 380-381 (2d Cir. 1975) (Friendly, J.). Although Benton asked to be paid for his information, he nonetheless revealed it without receiving any remuneration; the mere fact that Benton requested compensation does not suggest that he was untrustworthy.

Petitioners' claim (Pet. 24-39) that both courts below erred in concluding that exigent circumstances justified the warrantless search is also not well taken. It is undisputed that the boat was tilted at a dangerous 45-degree angle, with no lines or anchor out (Pet. App. 8a). Moreover, in denying the motion to suppress, the district court took judicial notice of the fact that the boat and its contents could have been washed away by the tides (1 Tr. 192-193). As the court of appeals similarly observed (Pet. App. 8a; emphasis in original), "to all *appearances* she was quarry both to storm and stealth, to be carried out to sea or to the bottom, or towed to a more ready location for the discharge or dispensing of drugs." Under these circumstances, the need to act quickly was apparent and the warrantless search was therefore justified.[3]

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[3]Petitioners' reliance (Pet. 31-32, 37-38) on cases such as *United States* v. *Martin*, 562 F. 2d 673 (D.C. Cir. 1977), and *United States* v. *Caraway*, 474 F. 2d 25 (5th Cir.), vacated as moot, 483 F. 2d 215 (5th Cir. 1973) (en banc), is misplaced. *Martin* involved the warrantless search of a suitcase in the absence of exigent circumstances. See *United States* v. *Chadwick*, 433 U.S. 1 (1977). In *Caraway*, the panel struck down a warrantless search of a houseboat, concluding that the Customs officers lacked probable cause and that the search was not authorized under 19 U.S.C. 1581(a), since the boat in question "was apparently inoperable, utilized as a stationary home, and clearly incapable of transporting cargo." 474 F. 2d at 32. Here, the courts below expressly

Petitioners appear to contend (Pet. 28, 32-33, 46) that in order to sustain the search under the Fourth Amendment the government was obligated to prove that the law enforcement officers had a subjective belief that the situation was exigent when they searched the boat without a warrant. There is no merit to this contention. In *Scott* v. *United States*, 436 U.S. 128, 135-138 (1978), this Court concluded that the determination whether or not the Fourth Amendment has been violated turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time. See *United States* v. *Robinson*, 414 U.S. 218, 236 (1973); *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968). Viewed objectively, as both courts below concluded, exigent circumstances justified the warrantless search of the boat.

2. Petitioner Hensler contends (Pet. 48-55) that his Fourth Amendment rights were violated by a search of his carry-on luggage at the Pittsburgh airport approximately six weeks prior to the boat search. This claim is without merit.

The officer in charge of security at the Pittsburgh airport testified that when petitioner Hensler's bag was viewed through an x-ray machine, only a single large black spot was visible, thus requiring further investigation (2 Tr. 85). Petitioner was told that the bag would have to be searched before he could take it into the security area (2 Tr. 91). After

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found that there was both probable cause and a realistic danger of destruction or removal of the boat. Petitioners cite the testimony of Customs officer Puig as evidence that the boat was not mobile at the time of the search (Pet. 26). But officer Puig testified that the boat was not mobile when he boarded it "[b]ecause the tide was down considerably" at that time (1 Tr. 108). The officer did not suggest that the boat would not have been mobile once the tides rose, nor did he indicate that the boat was not subject to damage as a result of rising tides.

the bag was opened, almost $100,000 in cash was revealed (2 Tr. 86-87). Petitioner testified that he was not given an opportunity to refuse permission to search the bag. He did admit, however, that he was familiar with security warning signs posted in airports, though he said he did not know their exact wording (2 Tr. 94-96).

Petitioner claims (Pet. 53-54) that the decision below upholding the security search is in error because it fails to require a showing of an individual's knowledge of his right to refuse to consent to such a search. However, as this Court observed in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973), knowledge of the right to refuse consent, while relevant to the question whether consent has been voluntary, is not "the *sine qua non* of an effective consent." The Court in *Schneckloth* concluded that the defendant had voluntarily consented to the search notwithstanding the absence of a showing that the defendant had actual knowledge of his right to refuse consent. Because of the "general knowledge that citizens boarding planes [are] subject to special scrutiny and to weapon searches" (*United States* v. *Skipwith*, 482 F. 2d 1272, 1274 (5th Cir. 1973)), and because petitioner here admitted that he was generally aware of signs posted in security areas of airports warning about the possibility of such searches, the district court correctly concluded (2 Tr. 97-101) that petitioner consented to the search by attempting to pass through the screening area and board the airplane. See *United States* v. *DeAngelo*, 584 F. 2d 46, 47-48 (4th Cir. 1978), cert. denied, 440 U.S. 935 (1979); *United States* v. *Williams*, 516 F. 2d 11 (2d Cir. 1975); *United States* v. *Edwards*, 498 F. 2d 496, 504-505 (2d Cir. 1974) (Oakes, J., concurring). Moreover, the result of the x-ray scan, which showed a large suspicious dark area, justified a protective search to determine whether the bag contained a pistol or other dangerous weapons. See *United States* v. *DeAngelo, supra*, 584 F. 2d at 47; *United States* v.

Moreno, 475 F. 2d 44 (5th Cir.), cert. denied, 414 U.S. 840 (1973); *United States* v. *Edwards, supra*, 498 F. 2d at 500-501.[4]

3. Finally, petitioner Batty argues (Pet. 56-63) that his confession was improperly admitted into evidence because his right to counsel was violated. This claim was properly rejected by the courts below.

Petitioner Batty was taken into custody on the instant charges on September 16, 1978, when DEA agents arrested him after his arraignment on a traffic offense in Gardner, Massachusetts. Petitioner testified that he was never advised of his *Miranda* rights and that he was assured that any statement he gave would be "off the record" (2 Tr. 39, 41-42). By contrast, DEA Agent Simkins denied any such promise and said that petitioner was advised of his rights, including his right to counsel, as soon as he was taken into custody, that petitioner acknowledged that he understood his rights, but that he nevertheless chose to give an oral

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[4]Petitioner incorrectly asserts (Pet. 52-53) that the court of appeals' decision conflicts with the decisions of the Ninth Circuit in *United States* v. *Homburg*, 546 F. 2d 1350 (1976), cert. denied, 431 U.S. 940 (1977); *United States* v. *Davis*, 482 F. 2d 893 (1973); and *United States* v. *Henry*, 615 F. 2d 1223 (1980). *Homburg* approved a similar search on the rationale of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *Henry* found that the defendant had consented to the search at issue by expressing his desire to take his briefcase with him on the airplane. The continuing validity of *Davis*, insofar as it rejected the *Terry* rationale, has been called into question by the Ninth Circuit's subsequent decision in *Homburg*. Moreover, *Davis* involved a search that occurred before the FAA required airlines to post signs warning passengers that they and their luggage were subject to searches; the court in *Henry* noted that in the years following the decision in *Davis* "the public has become increasingly aware of the security measures used in airports" (615 F. 2d at 1228-1229), and left open the question whether submission to an x-ray scan constitutes consent to a subsequent physical inspection (*id.* at 1229 n.7, citing *United States* v. *DeAngelo, supra*).

statement to the agents while he was being transported to the DEA offices in Boston (2 Tr. 14-18, 20-22). The district court refused to credit petitioner's testimony and instead found that petitioner was "given ample warning of his rights" and that he understood them (2 Tr. 51). The court also found that the government had sustained its burden of proving that petitioner intentionally waived his rights to remain silent and to have counsel present, and that his statement was voluntary (2 Tr. 51, 59-62).

Petitioner does not claim—nor could he—that he asked to consult with counsel before making his statement.[5] Instead, the principal basis for his contention that he did not waive his right to counsel is the fact that some time after giving his oral statement to the agents he refused to sign a waiver of rights form. But, as this Court noted in *North Carolina* v. *Butler*, 441 U.S. 369, 375 n.5 (1979), the courts of appeals have uniformly rejected the argument that a refusal to sign a written waiver form precludes a finding of waiver. While evidence of a defendant's refusal to sign a waiver form may bear on the question whether the defendant knowingly and intelligently waived his right to counsel, such evidence is of little probative value where, as here, the defendant orally waived his right and gave a statement *prior* to his refusal to sign a waiver form (see 2 Tr. 32). There is ample evidence in this case to support the district court's fact-based conclusion, affirmed by the court of appeals, that petitioner knowingly and intelligently waived his right to counsel.

Petitioner's reliance (Pet. 59-61) on *Brewer* v. *Williams*, 430 U.S. 387 (1977), is misplaced. In that case, despite an agreement between the police and defense counsel that

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[5]Agent Simkins testified that he asked petitioner whether he wanted to call his wife or attorney, but petitioner declined, saying there was no need to do so because his attorney had already been contacted (2 Tr. 18-19).

Williams would not be questioned and despite Williams' express and implicit assertions of his right to counsel, a police officer purposefully isolated Williams from his attorneys and elicited incriminating statements from him through skillful interrogation. The police officer did not remind Williams of his right to have a lawyer present and made no effort to ascertain whether Williams wished to relinquish that right. In those circumstances, the Court held that there was no reasonable basis for finding that Williams waived his right to counsel. However, the Court made it clear that its decision did not mean that an accused could never, without notice to counsel, waive his right to counsel after formal charges have been brought; it held only that Williams had not done so on the facts of that case. 430 U.S. at 405-406. Nor is this case like *Massiah* v. *United States*, 377 U.S. 201 (1964), which involved the use at trial of a defendant's post-indictment statements to a co-defendant who was acting as an undercover informant for the government. In such a setting, as this Court recently reiterated in *United States* v. *Henry*, No. 79-121 (June 16, 1980), slip op. 9, the defendant, unaware that he is speaking to "a government agent expressly commissioned to secure evidence, cannot be held to have waived his right to the assistance of counsel." Here, however, unlike in *Brewer* or *Massiah*, petitioner understood his rights and chose to waive them.[6]

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[6]Petitioner does not contend that he was unaware of the fact that he had been indicted, or of the implications of that fact, when he gave his statement to Agent Simkins; indeed, the record strongly suggests that petitioner was fully cognizant of the situation, since an attorney had already been retained to represent him on the instant charges (2 Tr. 18-19). Accordingly, this case is not an appropriate one in which to resolve the question whether an indicted defendant who has been advised of his *Miranda* rights must additionally be informed that he has been indicted and advised of the significance of an indictment in order to make a knowing and intelligent waiver of his right to counsel during a pre-arraignment interrogation. See *United States* v. *Mohabir*, 624 F. 2d 1140, 1145-1151 (2d Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1981

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